CONSENT IN THE CRIMINAL LAW.

THIS subject divides itself naturally into two parts: First, what is consent? Second, what is the effect of consent?

I.

It is not always clear at first sight what act is consented to, or how far a knowledge of all the circumstances is necessary for an effectual consent. A hands B a gold coin, thinking it a silver one: has he consented to part with the gold coin? Or, seeing what he takes to be a pasteboard box upon the sidewalk, he kicks it, and finds it a brick: is the consequent pain in his foot inflicted with his consent? The answer to these questions is not to be found (as jurists have too often tried to find it) upon the surface of a single case; a comparison of many authorities is necessary for a satisfactory solution. It will not do to depend, as is often done, on the maxim, "Fraud vitiates consent." Fraud, it is true, does often vitiate consent, but this is a statement as to the effect of consent, not as to its existence; fraud does not negative consent. Consent exists, however acquired; and if we say there is a consent that fraud vitiates, we have solved the present question.

The first difficulty to be met may best be suggested by a comparison of two cases. In the first, a young man gave a girl a fig into which he had put a poisonous powder; the girl ate the fig, and was injured by the powder.[1] In the second, one who asked the loan of a shilling was by mistake handed a sovereign, which he took in ignorance of the mistake.[2] What consent, if any, was given in the two cases?

Now, it seems to me quite clear that in the former case the girl consented to take one thing, — a fig, — and did take two things, — fig and poison. The consent, then, did not cover the poison; she was given that in addition to what she consented to receive. As the case stood, poison had been administered to her without her consent. In the second case, it seems that there was consent to give and to take a coin. The parties surely consented to pass something, and the coin was the only thing in question. In the same way, if, instead of a fig, in the former case the girl had

[1] Com. *v.* Stratton, 114 Mass. 303; reprinted in my Cases on Criminal Law, 451.
[2] Reg. *v.* Ashwell, 16 Cox, C. C. 1; 16 Q. B. D. 190; Cas. Crim. Law, 566.

received a piece of poisonous substance in the shape of a fig, supposing it to be a fig, she would have consented to receive that substance.[1] In these cases consent exists, though given under a misapprehension. Cases may be imagined near the line exceedingly hard to decide. Suppose in the course of a ball-game one player throws to another a ball to which is attached a dynamite cartridge, there is clearly no consent to catch the cartridge, whether it is attached outside or inside the cover. On the other hand, if such a cartridge alone is thrown, and one sees and voluntarily catches it, there is consent to receive it, in spite of the mistake. But if the whole interior of a ball is taken out, and the cover filled with dynamite, a jury may have a difficult question to solve. For if there is but one thing, — a ball of dynamite, — there is consent to receive it, the party having consented, as is agreed, to catch something. If there are two things, — a ball *plus* dynamite, — there is no consent to receive the dynamite. This is the sort of question which a jury is much better fitted than a court to answer; for, in the nature of things, the decision in one set of circumstances ought not and cannot prejudice the decision of a similar question later. The only general statement to be made is that if more things were done than were consented to, the additional things were done without consent, — which seems true enough mathematically, but a lame and impotent conclusion for so labored an argument. The triteness of the conclusion is admitted; the ne-

[1] The judges who favored conviction in Reg. *v.* Ashwell were much confused on this point. Thus, Cave, J., said: "In order that there may be a consent, a man must be under no mistake as to that to which he consents; and I think, therefore, that Ashwell did not consent to the possession of the sovereign until he knew that it was a sovereign." Lord Coleridge said: "There was no delivery of the sovereign to the prisoner by Keogh, because there was no intention to deliver, and no knowledge that it had been delivered. . . . In good sense, it seems to me that he did not take it till he knew what he had got. . . . I can see no sensible or intelligible distinction between the delivery of a bureau not known to contain a sum of money, or a purse, and the delivery of a piece of metal not known to contain in it 20*s*." The true view was expressed by Cox, Serjeant, in Reg. *v.* Jacobs, 12 Cox, C. C. 151 (a case utterly overlooked in Ashwell's case): "He intended to give the prisoner the particular piece of coin he held between his fingers, although he was mistaken as to the nature of that coin. At the instant of its passing from the fingers of the prosecutor to the hand of the prisoner, he intended to give, and the other intended to receive, the coin so held." As Smith, J., said, in Reg. *v.* Ashwell, the prosecutor "intended to deliver the coin to the prisoner, and the prisoner to receive it. The chattel, namely, the coin, was delivered over to the prisoner by its owner, and the prisoner received it honestly. He always knew he had the coin in his possession after it had been delivered to him. The only thing which was subsequently found was that the coin delivered was worth 240*d*. instead of 12*d*., as had been supposed."

cessity of the argument, in view of the authorities, though lamentable, is patent.

Many applications of this doctrine are suggested by the cases. For instance, consent to give and take a desk does not include consent to give and take money, or anything else concealed in the desk, and possession of a thing so concealed does not pass with the desk;[1] though consent to give and take a desk, and whatever it contained, would cover all the contents, whatever they might be. So where a sealed envelope is given, there is consent to take its ordinary contents,[2] since an envelope implies an enclosure; but if it contained not only a letter, but also a bit of gold that had accidentally fallen in, there would be no consent to take the gold. So where one was driving a herd of cattle, and a strange beast joined the herd without being noticed by the drover, there was no consent to take the beast; but if the drover noticed the beast near the herd, and drove it among the others, thinking it one of the herd, he consented to take it, though the consent was induced by a misapprehension, and thereafter he was in possession of the beast.[3] The same considerations should cover the case where a diseased man has connection with his wife. The marital consent covers the connection, but not contact with the virus, a foreign substance conveyed to the wife without her consent, like the poison in the figs.[4]

---

[1] Merry *v.* Green, 7 M. & W. 623; Cas. Crim. Law, 548; Robinson *v.* State, 11 Tex. App. 403.

[2] Reg. *v.* Flowers, 16 Cox, C. C. 33; Cas. Crim. Law, 574. And see Rex *v.* Mucklow, 1 Moody, 160; Cas. Crim. Law, 547.

[3] See Reg. *v.* Finlayson, 3 New South Wales Sup. Ct. 301; Cas. Crim. Law, 565; Reg. *v.* Riley, 6 Cox, C. C. 88; Cas. Crim. Law, 591.

[4] This point was much debated in the case of Reg. *v.* Clarence, 16 Cox, C. C. 511; 22 Q. B. D. 23; Cas. Crim. Law, 438; and finally decided adversely to the position I have taken. Wills, J., for the majority of the court, said, in the course of his opinion: "That consent obtained by fraud is no consent at all is not true as a general proposition, either in fact or in law. If a man meets a woman in the street, and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud; but it would be childish to say that she did not consent. . . . To separate the act into two portions, as was suggested in one of the Irish cases [Hegarty *v.* Shine, L. R. 4 Ir. 288?], and to say that there was consent to so much of it as did not consist in the administration of an animal poison, seems to me a subtlety of an extreme kind. There is, under the circumstances, just as much and just as little consent to one part of the transaction as to the rest of it. No one can doubt that in this case, had the truth been known, there would have been no consent, or even a distant approach to it. I greatly prefer the reasoning of those who say that because the consent was not to the act done, the thing done is an assault. If an assault, a rape also, as it appears to me." What seems to me a far sounder argument is well put by

The question whether fraud can negative consent has been much discussed in rape cases. Where connection is secured by personating the husband, it is almost everywhere held, properly, that consent exists in fact, and that there is therefore no rape.[1] The same thing is held where connection is obtained by some other fraud, yet is consented to,[2] or by taking advantage of a woman of weak mind, who consents because of her mental weakness;[3] consent, however obtained, is inconsistent with the commission of

---

Hawkins, J., in his dissenting opinion: "In my judgment, wilfully to place his diseased person in contact with hers, without her express consent, amounts to an assault. It has been argued that to hold this would be to hold that a man who, suffering from gonorrhœa, has communion with his wife might be guilty of the crime of rape. I do not think this would be so. Rape consists in a man having sexual intercourse with a woman without her consent; and the marital privilege being equivalent to consent given once for all at the time of marriage, it follows that the mere act of sexual communion is lawful. But there is a wide difference between a simple act of communion which is lawful, and an act of communion combined with infectious contagion, endangering health and causing harm, which is unlawful. It may be said that, assuming a man to be diseased, still, as he cannot have communion with his wife without contact, the communication of the disease is the result of a lawful act, and therefore cannot be criminal. My reply to this argument is that if a person, having a privilege of which he may avail himself or not, at his will and pleasure, cannot exercise it without at the same time doing something not included in this privilege, and which is unlawful and dangerous to another, he must either forego his privilege, or take the consequences of his unlawful conduct. I may further illustrate my view upon this part of the case by applying, by way of test, to an indictment for assault the old form of civil pleadings. Thus: Indictment for an assault; plea of justification, that the alleged assault was the having sexual communion with the prosecutrix, she being the prisoner's wife; new assignment, that the assault charged was not that charged in the plea, but the unlawful and malicious contact of her person with dangerous and contagious disease. What possible justification could be pleaded or answer given to such new assignment?"

[1] Reg. *v.* Barrow, L. R. 1 C. C. 156; Cas. Crim. Law, 455; Wyatt *v.* State, 2 Swan, 394; *contra*, Reg. *v.* Dee, 15 Cox, C. C. 579, on the ground, as stated by Palles, C. B., that consent must "proceed from the will, not when such will is acting without the control of reason, as in idiocy or drunkenness, but from the will sufficiently enlightened by the intellect to make such consent the act of a reasoning being. . . . Excluding cases in which an outward action apparently, but not in fact, accompanied by mind is acted upon by another, any act done by one under the *bona fide* belief that it is another act *different in its essence* is not in law *his* act; and that is the present case. The person by whom the act was to be performed was part of its essence. The consent of the intellect, the only consent known to the law, was to the act of the husband only." It seems sufficiently obvious that no act of the husband was in question, and that if there was consent to anything, it was to the act offered and done by the defendant. The error arises from a confusion between consent to an act and consent to a crime. The woman does not, it is true, consent to a crime; but she does consent to the act, and as a result there is no crime.

[2] Don Moran *v.* People, 25 Mich. 356.

[3] Reg. *v.* Fletcher, 10 Cox, C. C. 248.

rape.[1] It is, however, always held in such a case that the defendant is guilty of assault and battery;[2] and in at least one well-considered case this is put upon the ground that fraud negatives consent.[3] The true explanation of these cases is without doubt one to be discussed later, in considering the effect of consent.

A similar question arose under an English statute which made it criminal for the master of a workhouse to dispose of the bodies of deceased inmates for dissection, if relatives required them to be buried. A master of a workhouse by falsely pretending to bury the body of a deceased inmate induced the relatives to refrain from formally requiring burial; and he then sold the body for dissection. It was held that he could not be punished under the statute. Pollock, C. B., truly said that though defendant acted a lie to prevent the requirement from being made, that was not the offence with which he was charged.[4]

A seeming consent extorted by force or terror differs from consent obtained by fraud. In the latter case the mind is deceived into agreement; in the former, the body is forced to act without a real agreement of the mind. Force or terror, then, may negative consent;[5] and, similarly, where one is forced to do a criminal act, he may show the coercion as a defence.[6] This is, however, confined to cases where the force threatened is immediate,[7] and is to the person, or at least to property in the personal possession of

---

[1] Cases where consent is lacking must be distinguished. So where one has connection with a woman insensible from intoxication (Reg. *v.* Champlin, 1 Den. C. C. 89; Com. *v.* Burke, 105 Mass. 376), or asleep (Reg. *v.* Mayers, 12 Cox, C. C. 311), or submitting because of idiocy or ignorance (Reg. *v.* Fletcher, 8 Cox, C. C. 131; Pomeroy *v.* State, 94 Ind. 96), the act is done without her consent, and is therefore rape. The distinction is well pointed out in Reg. *v.* Barratt, 12 Cox, C. C. 498; L. R. 2 C. C. 81.

[2] Reg. *v.* Saunders, 8 C. & P. 265 (personation); Rex *v.* Nichols, Russ. & Ry. 130; Reg. *v.* Lock, L. R. 2 C. C. 10 (advantage of ignorance); Reg. *v.* Bennett, 4 F. & F. 1105 (disease).

[3] Reg. *v.* Case, 4 Cox, C. C. 220; Cas. Crim. Law, 435. "What she consented to was something wholly different from that which was done, and therefore that which was done was done without her consent;" *per* Wilde, C. J. Alderson, B., said: "When a man obtains possession of the person of a woman by fraud, it is against her will;" and Platt, B., added, "The girl consents to one thing, and the defendant does another." See also Rex *v.* Rosinski, 1 Moody, 19.

[4] Reg. *v.* Feist, D. & B. 570, 3 Laws Cr. Def. 336.

[5] Reg. *v.* Bunce, 1 F. & F. 523; Cas. Crim. Law, 651; Reg. *v.* Woodhurst, 12 Cox, C. C. 443; Reg. *v.* Blackham, 2 East, P. C. 711; Cas. Crim. Law, 202; Taplin's Case, 2 East, P. C. 712. As where one is forced to sell property by threats or violence if he refuses. Rex *v.* Simons, 2 East, P. C. 712; Spencer's Case, *ibid.*

[6] Rex *v.* Crutchley, 5 C. & P. 133; Cas. Crim. Law, 367.

[7] Resp. *v.* McCarty, 2 Dall. 86; Cas. Crim. Law, 364.

the owner; as, for instance, in case of a threat to tear or burn down the house in which a man lives.[1]

It is often important to notice just the extent and the nature of the consent given. Consent that one may take a thing in his hand is not necessarily consent that he may take possession of it. Thus, to use the classical illustration, where plate is put before a guest at an inn, there is no consent that he may take possession of it; and if he does so, it is an act of trespass.[2] In the same way it is to be observed that mere acquiescence in the act of a thief by the owner of goods taken, for the purpose of detecting the crime, is not consent that the goods shall be taken. It is at most a consent to afford a chance for a tortious taking.[3] If, however, the owner takes any step to induce the act, it is impossible to say that the act is not done with his consent.[4]

It is to be borne in mind that a conditional consent that something may be done can be given in advance. If, then, the condition is fulfilled, the consent is valid; if, however, the condition is not exactly carried out, it cannot be relied upon. Thus, where a box is placed in a public place containing a printed notice that any one who drops a nickel in the slot shall have a cigar, the consent that a cigar may be taken is conditional upon dropping the nickel, and if the cigar is taken without this being done, it is an act of trespass.[5] This principle may sometimes be relied upon to nega-

---

[1] Rex *v.* Astley, 2 East, P. C. 729. This rule was relaxed in England for a while, in case of a threat to accuse one of sodomitical practices; money extorted by such a threat was held to be parted with against the consent of the owner, the threatened injury to the character taking the place of force to the person. This departure from principle was no doubt due to the extraordinary apprehension with which this disgusting crime was then regarded in England (it was called "the greatest of all crimes" by Ashhurst, J., in Hickman's case); and it did not extend to similar threats not connected with this particular crime (Rex v. Knewland, 2 Leach, 721). Those who care to pursue the unprofitable subject will find material for the study in Rex *v.* Donolly, 2 East, P. C. 715; 1 Leach, 193; Rex *v.* Hickman, 1 Leach, 278; Rex *v.* Jackson, 1 East, P. C. Add.; Reane's Case, 2 East, P. C. 734; Egerton's Case, Russ. & Ry. 375; Fuller's Case, Russ. & Ry. 408.

[2] Compare such cases as Rex *v.* Chissers, T. Raym. 275; Cas. Crim. Law, 515; Reg. *v.* Slowly, 12 Cox, C. C. 269; Cas. Crim. Law, 516; Com. *v.* O'Malley, 97 Mass. 584; Cas. Crim. Law, 518; Com. *v.* Lannan, 153 Mass. 287; Cas. Crim. Law, 521.

[3] Norden's Case, cited in McDaniel's Case, Fost. C. L. 121; Cas. Crim. Law, 152; Eggington's Case, 2 East, P. C. 666; Cas. Crim. Law, 154; State *v.* Anone, 2 N. & Mel. 27; State *v.* Hayes, 105 Mo. 76.

[4] McDaniel's Case, *supra.*

[5] Reg. *v.* Hands, 16 Cox, C. C. 188; Cas. Crim. Law, 614. So where a box of matches is placed on a counter for the use of customers (Mitchum *v.* State, 45 Ala. 29; Cas. Crim. Law, 616). I have already suggested this as a possible explanation of the

tive consent in cases of indecent assault, similar to those already considered.[1] It is also involved wherever a game is played that involves a hand-to-hand struggle. In a foot-ball game, for instance, each player consents in advance to such injuries as he may suffer, so long as they are inflicted by one acting within the rules of the game; but an injury caused by unfair play is not consented to.[2]

II.

The existence of consent is a question of fact; the effect of it purely a question of law. To the consideration of that question we now proceed.

The injury redressed by every prosecution is an injury to the public. The consent of an individual that an act criminal in its nature should be done is therefore no defence to a prosecution. An act which consists of an injury to an individual may, however, be a criminal act only if done without the consent of the individual. Of this nature are larceny, which consists in a taking against the will of the owner; rape, which is a connection with a woman without her consent; and simple assault, which cannot be committed upon one who consents, since it involves fear or a menace of fear. The effect of consent in such cases, however obtained, must be to put an end to any question of crime. Thus, as we have seen, connection with a woman where her consent is obtained by fraud cannot be rape; and an unsuccessful attempt to have connection with a girl below the age of consent cannot be a simple assault, if she in fact consents.[3] The same thing must be true in larceny; a taking with the consent of the owner, however obtained, is not a taking *invito domino*, and is therefore no larceny. As we have seen, where the owner of goods really brings it about that they are larcenously taken, in order that he may detect the thief, there is no larceny, for the taking is with the owner's consent. So where the owner of stolen goods recovers them, but allows the

---

well-known Carrier's Case (6 HARVARD LAW REVIEW, 250). See Mr. Justice Stephen's comments on the latter case in Reg. *v.* Ashwell, *supra*.

[1] See the language of Platt, B., in Reg. *v.* Case, *supra*. This same principle was relied upon to support conviction, by Pigott, B., in Reg. *v.* Middleton, L. R. 2 C. C. 38; Cas. Crim. Law, 617, and appears to be the most tenable ground on which to put the case. The difficulty with it is one of fact.

[2] See Reg. *v.* Bradshaw, 14 Cox, C. C. 83; Cas. Crim. Law, 146.

[3] Reg. *v.* Martin, 2 Moo. C. C. 123. *Contra*, People *v.* Gordon, 70 Cal. 467; Hays *v.* People, 1 Hill, 351.

thief to retain them in order to detect a receiver, the crime of receiving stolen property cannot be committed as to the goods.[1] In an analogous case, where one solicited goods by false pretences and obtained them, but the owner when he gave them up knew of the falsity of the pretence, the crime of obtaining by false pretences was not committed;[2] and where defendant, in order to help a prisoner of war escape, took him in her carriage beyond the lines, but he had been allowed to go to the place by the military authorities in order to detect the defendant, the crime of assisting a prisoner to escape was not committed.[3]

There is an exception to this doctrine in the anomalous case of larceny by trick. In such a case the owner consents to give up the goods, but the wrongdoer is held guilty of larceny because of his fraud in obtaining the consent. I have elsewhere stated certain objections to this doctrine, and have tried to show that it is of late growth, and founded on mistake.[4] What I have just said is another theoretical objection to it. Another exception, probably earlier established, is the doctrine of constructive breaking in burglary. According to this doctrine, burglary may exist without an actual breaking of the house, if the wrongdoer obtains entrance by fraud. Some of the earliest cases were cases of entry without consent of the owner of the house, under color of legal process,[5] or of entry secured by frightening an inmate so that he opened a door,[6] or of entry made into a door opened by an inmate, but not to let in the thief.[7] In none of these cases was the entry made by consent of the owner. But cases have been decided in the same way where consent to the entry was really obtained, though by fraud.[8] These decisions, it is submitted, were erroneous.

In some cases of criminal injury to individuals a lack of consent of the individual is not always a necessary element of the crime. Homicide, mayhem, and battery may be committed, though the individual injured consented to the injury. The reason for this is

---

[1] Reg. *v.* Dolan, 6 Cox, C. C. 449; Cas. Crim. Law, 765; Reg. *v.* Villensky (1892), 2 Q. B. 597.

[2] Reg. *v.* Mills, 7 Cox, C. C. 263; Cas. Crim. Law, 727.

[3] Rex *v.* Martin, Russ. & Ry. 196; Cas. Crim. Law, 156. And see U. S. *v.* Adams, 59 Fed. 674.

[4] 6 HARVARD LAW REVIEW, 244.

[5] Farr's Case, Kel. 43; 3 Co. Inst. 64.

[6] 2 East, P. C. 486, and authorities cited.

[7] Le Mott's Case, Kel. 42.

[8] Cassey's Case, Kel. 62; Rex *v.* Hawkins, 2 Russ. Cr. 9.

clear: the public has an interest in the personal safety of its citizens, and is injured where the safety of any individual is threatened, whether by himself or another. The public is not injured merely because A's property goes to B, or A destroys his own property; but it is concerned if A's head or right hand is cut off. Consent of the injured party is therefore not always a defence in a prosecution for a personal injury. A personal injury inflicted by consent may harm the public if it tends to cause a breach of the peace, or severe bodily harm to the injured party. A prize-fight, therefore, or any public fight, is criminal, in spite of the consent of the parties to it to permit injury, because it tends to a breach of the peace.[1] A game which involves a physical struggle may be a commendable and manly sport, or it may be an illegal contest in which all the participants are or may become criminals; this depends upon whether it is a game which endangers life. Thus, in a prosecution for a death which was caused accidentally in playing the game of foot-ball, it was left to the jury to say whether the game was dangerous; for if so, consent on the part of the players to submit to what the game had in store for them would not protect a player from prosecution. "No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land, and the law of the land says you shall not do that which is likely to cause the death of another."[2] And where death happened accidentally while two parties were fencing with sharp foils, protected with buttons at the tips, the killer was held guilty of manslaughter.[3] So where the hand of a beggar was cut off at his request, both parties to the transaction were held to be criminal.[4]

Is the public interested in preventing less grave physical injuries, even when inflicted by consent, if the consent is obtained by fraud? It would seem not, as a general principle. A by fraud induces B to submit to a box on the ear, or to touch a hot poker and thereby get burned; the real wrong is a fraudulent one, of a sort which the public is not concerned to prevent. The party should be confined to his civil action. But where the injury is against a woman's chastity, other considerations may well prevail. It is not the business of the public, to be sure, to keep

[1] Com. *v.* Collberg, 119 Mass. 350; Cas. Crim. Law, 148.

[2] Bramwell, L. J., in Reg. *v.* Bradshaw, 14 Cox, C. C. 83; Cas. Crim. Law, 146.

[3] Chichester's Case, Aleyn, 12.

[4] Wright's Case, Co. Lit. 127 a; Cas. Crim. Law, 145.

women chaste against their will; but is it not the concern of the public to prevent women losing their chastity against their will? And many cases have occurred where, although we must say the physical connection was consented to, yet there was no consent to become unchaste. One way of securing the result indicated would be to punish the man as a seducer; but this, at common law, would be trenching on the ground of the ecclesiastical courts, and, besides, seduction is generally a much less aggravated offence than the one under discussion. Another way of securing the desired result remains. The seducer has committed a technical battery; and if we say that the consent of the woman shall not in such a case protect the seducer from prosecution, we may punish him. We have only to say that he has injured the public in spite of the consent; and I, for one, should be inclined to say this as readily in the case of a fraudulent seduction as in the case of an act tending to a breach of the peace.

And so in fact the authorities say, although they do not expressly lay down such a reason for their decision. Where a woman's consent to connection is obtained by such a misrepresentation as to the nature of the act as, if true, would make it not unchaste, but entirely proper, the seducer may be punished for assault and battery. Thus, one who secures connection with a woman by personating her husband, may be punished for assault and battery.[1] And this principle appears to offer the best explanation of the decision in Reg. *v.* Case,[2] where a physician obtained connection under pretence of medical treatment. Thus the public is not without remedy in these cases, although the wrongdoer cannot be punished for rape. The Scotch law treats the matter in the same way. The offence is not rape, but "an innominate offence," — that is, a misdemeanor.[3]

We have seen, then, the impropriety of confusing lack of consent with ineffectiveness of consent. If consent exists, we must not refuse to recognize its existence. But in many cases a wrongdoer may not be absolved from guilt, though what he did was done with the consent of the sufferer. If he is charged with that sort

---

[1] Reg. *v.* Saunders, 8 C. & P. 265.

[2] 4 Cox, C. C 220; Cas. Crim. Law, 435.

[3] Reg. *v.* Sweenie, 8 Cox, C. C. 223. This principle would seem not to cover the case of mere assault, without physical contact. The peculiar wrong to be guarded against is not then accomplished, even in part. The English case of Reg. *v.* Martin, already referred to, was therefore correctly decided. See, however, Hays *v.* People, 1 Hill, 351.

of crime which is inconsistent with consent of the injured party, such consent is of course a perfect disproof of the crime; but in cases of actual personal injury, whether homicide, mayhem, or battery, consent of the injured party is no excuse to the wrong-doer if the act consented to tends to a breach of the peace or to severe bodily harm, or to a loss of chastity which is not consented to.

J. H. Beale, Jr.